Country Report on Switzerland

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Europa Law Publishing, Groningen 2010

Security: A General Principle of Social Security Law in Europe

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Part I Legislative Aspects*

1 State obligation to introduce and maintain social security

1.1 Social security in the Swiss federal state

Switzerland is a federal state with 7.5 million inhabitants. The local and demographic structure of the 26 states (Cantons) is based on historical developments. The Cantons differ substantially in their number of inhabitants (from Appenzell Inner Rhodes with 14,700 inhabitants to Zurich with 1,250,000 inhabitants) and their territorial size (from Basel City with 26 km2 to Grisons with 7,105 km2).[1]

The central state (Confederation) has the competence for legislation if the Federal Constitution contains explicit authorisations (Arts. 3 and 42 Constitution[2]). In the last 150 years the Federal Constitution has undergone several partial changes. The Confederation acquired substantial competences in almost all fields of modern legislation. Nevertheless, the Cantons retained a remarkable influence on federal legislation. Furthermore, the Cantons are – in many fields – responsible for the execution of the federal law. According to the principle of subsidiarity, the competences of the Cantons should not be restricted more than needed. The Confederation shall (only) assume the tasks which require uniform regulation (Art. 42 al. 2 Constitution). This federal principle of subsidiarity will be strengthened by the general principle of subsidiarity which entered into force in January 2008.[3]

The complete reform of the Swiss Constitution, which entered into force on January 1, 2000, did not change the principles of the old Swiss Constitution from 1874. It was meant as a formal revision in order to reach a clear basis for further reforms. In 2004 a set of provisions concerning the competences and tasks of Confederation and Cantons was adopted and entered into force in 2008.[4] Apart from the already mentioned general principle of subsidiarity the competences in some fields of social security will be clarified by these new norms.[5]

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* Thanks to my assistant Myriam Schwendener for her valuable help.

1 See for further details Thomas Fleiner/Alexander Misic/Nicole Töpperwien, Swiss Constitutional Law, The Hague/Berne 2005, N 42 et seq.

2 The Constitution of the Swiss Confederation of April 18, 1999 (Constitution), Official systematic Collection of Swiss Legislation (SR) 101. See for an (inofficial) english translation of the Constitution http://www.admin.ch/ch/itl/rs/1/c101ENG.pdf.

3 Art. 5a Constitution.

4 Bundesbeschluss zur Neugestaltung des Finanzausgleichs und der Aufgabenteilung zwischen Bund und Kantonen, Bundesblatt (BBl) 2003 6591.

5 E.g. Art. 112 al. 3 and 4 Constitution (financing of the old age, survivors and disabilities insurance), Art. 112a Constitution (definitive competence for the system of complementary benefits), Art. 112b

The Confederation has the competence to adopt legislation in most fields of social security, as defined in ILO convention No. 102. Due to the specific Swiss approach to direct democracy (right of initiative to change the Constitution, compulsory referendum with the requirement of a double majority for changes of the Constitution[6]), the constitutional norms which authorise the Confederation to adopt legislation are often very detailed and contain already the core principles of the legislation to adopt.[7]

Social assistance is the last field of social policy to remain almost entirely in the legislative competence of the Cantons. The Constitution (Art. 115 Constitution) declares that the state of residence is responsible for persons in need of social assistance. In the same provision the Confederation is declared competent for legislation concerning exceptions in intercantonal relations.[8]

1.2 Legal basis of social security

1.2.1 Federal level

The Federal Constitution from 1874 did not include any specific rules concerning social security. Apart from the provisions empowering the Confederation to legislate in matters of social security, only the general goal of 'welfare', mentioned in Art. 2 of the former Federal Constitution, was known. The new Federal Constitution has a clear structure and contains many explicit provisions in the field of social security. Most of them have been acknowledged by political and judicial practice before the adoption of the new Constitution.

Aspects of social security are touched by several norms. These norms have different structures; some of them only set vague goals to the legislature, others determine clear cut duties to provide specific protection for social risks:

The *prologue of the Federal Constitution* enclosing a solemn declaration of the basic values of the Confederation already mentions welfare of people in urgent needs as a maxim of the Confederation. The binding force of the prologue is very weak, but the same values are repeated in other provisions of the Constitution which have greater legal impact.

The *general goals* of the Federal Confederation are mentioned in Art. 2 Constitution. Among those goals 'common welfare' and 'equality of chances' figure as central values.[9] The function of the rather abstract provision is to give a general direction to governmental action. In addition to the general

Constitution (integration of disabled persons), Art. 112c Constitution (care and help for disabled and old persons).

6 Art. 140 Constitution.

7 E.g. At. 111–114 Constitution.

8 See the Federal Law on the competence for the assistance of people in need, SR 851.1. (All legislation quoted in this paper can be found under its systematic number [SR] on this site: www.admin.ch/ch/d/sr/sr.html.

9 Art. 2 al. 2 and 3 Constitution.

goal of welfare, Art. 94 Constitution mentions welfare as a central objective of economic policy. This means that within economic policy the goals of social welfare must be observed.

Following the example of several modern foreign constitutions as well as a couple of new cantonal constitutions, the Federal Constitution makes a distinction between social goals (*Sozialziele*) and social rights (*Sozialrechte*). The social goals are binding for state authorities but do not give subjective rights to individuals,[10] whereas social rights are fundamental rights granting subjective constitutional rights to individuals. In the Federal Constitution only the right to basic aid in situations of distress (Art. 12) and the right to a sufficient, free and confessional neutral education in public schools (Art. 19) are acknowledged to be social rights.[11]

The core provision of social security in the Swiss Constitution – directly following the catalogue of fundamental rights and freedoms – is Art. 41 (*social goals*). The Confederation and the Cantons shall strive to ensure that, in addition to personal responsibility and private initiative,

- every person shall benefit from social security;
- every person shall benefit from necessary health care;
- the family as a community of adults and children shall be protected and encouraged;
- every person capable of working shall sustain himself or herself through working under fair and adequate conditions;
- every person looking for housing shall find, for himself or herself and his or her family, appropriate housing at reasonable conditions;
- children and young people and people of working age shall benefit from initial and continuing education according to their abilities;
- children and young people shall be encouraged in their development to become independent and socially responsible persons, and they shall be supported in their social, cultural, and political integration.

Furthermore, the Confederation and the Cantons shall – within the framework of their constitutional powers – strive to ensure that every person shall be insured against the economic consequences of old age, disability, disease or sickness, accident, unemployment, maternity, orphanhood, and widowhood.[12]

The incorporation of social goals was very controversial during the process of the constitutional reform. Contrary to the hard debates, the implementation of the social goals did not cause any problems. It has even been shown that the legal impact of the social goals is marginal.[13] Social goals are hardly ever

10 See Art. 41 al. 4 of the Swiss Constitution stating no direct subjective rights to state benefits may be derived from the social goals.

11 See Part I, 1.3.

12 Art. 41 al. 2 Constitution.

13 See Deniz Danaci, Der Einfluss der Sozialziele auf die Beschlüsse der Bundesversammlung seit dem Inkrafttreten der neuen Bundesverfassung, Jusletter vom 30. April 2007 (www.jusletter.ch).

mentioned during the elaboration of new legislation. It cannot be said that social goals have already turned out to motivate legislation in matters of social security. The goals are also formulated too vaguely to block or to limit changes within the existing social security system in an effective way.[14]

As already mentioned above, the provisions which authorise the Confederation are often very detailed and contain in several cases the duty – and not only the authorisation – to adopt legislation:

- The Confederation shall legislate on fair compensation for those who perform military or an alternative service. Persons rendering military or an alternative service and thereby suffering health impairments or losing their lives, have the right for themselves or their relatives to adequate support by the Confederation.[15] Both compulsory tasks have been fulfilled by the adoption of the Federal Law on military insurance and the Federal Law on Compensation for loss of income.[16]
- The Confederation shall take measures for an adequate social security for the elderly, survivors and disabled persons. These shall be based on three pillars, namely the federal old age, survivors and disability insurance, the employee pension plans and the provision by individuals for their own future (Art. 111 al. 1 Constitution). Apart from this general concept of the tree pillars and the compulsory task to create these social security systems, the Constitution includes quite narrow guidelines to the legislature (Arts. 112 and 113 Constitution). The Federal Law on old age and survivors insurance,[17] the Federal Law on disability insurance[18] and the Federal Law on old age, survivors and disability insurance for employed persons[19] implement the concept of the three pillars.
- If the level of insurance prestations of the first pillar (old-age and survivors insurance and disability insurance) is not sufficient to cover basic living expenses appropriately (Art. 112 al. 2 lit. b Constitution), the system of complementary benefits – which is not the same as social assistance[20] – grants prestations to achieve this level (Art. 196 No. 10 Constitution; this provision will be replaced by a new Art. 112a Constitution by January 1, 2008).
- The legislation on unemployment insurance is also a legal duty of the Confederation (Art. 114 al. 1 Constitution). Above this duty the Confederation may legislate on social assistance to the unemployed (Art. 114 al. 2 Constitution). Until now there is no federal legislation on social assistance to the unemployed whereas the Law on unemployment insurance[21] implements the duty to legislate in this field.
- The Federation may legislate on family allowances and operate a federal family compensation fund (Art. 116 al. 2 Constitution). Apart from the family allowances for persons working in agriculture, the federation has not made use of this authorisation. Based on a parliamentary initiative, a federal law on family allowances was adopted in a popular referendum in 2006. The law will harmonize the existing cantonal systems and set minimal standards. The Cantons will remain competent to grant higher prestations or include self-employed persons in the compulsory system. The new federal law entered into force on January 1, 2009.
- The duty to institute a maternity insurance scheme has been mentioned since 1946 in the Constitution. It took almost 60 years until a federal maternity insurance system was adopted. Former projects did not find a majority in popular referendums. The maternity insurance system is now part of the federal law on compensation for loss of income,[22] which used to be a compensation system only for people performing military or an alternative service.
- Based on Art. 117 Constitution the Confederation shall legislate on health and accident insurance. It may declare health and accident insurance as compulsory in general or for certain categories of persons. Health insurance is mandatory for the whole population since 1996; the Law on accident insurance[23] declares accident insurance mandatory for employed persons.

Among all the provisions mentioned above, the social goals seem to be – at first glance – the basis of social security legislation on the federal level. In fact, their legal impact is modest. The basis of the social security systems in force consists of the provisions attributing the Confederation the duty or at least the competence to legislation.[24] Apart from the authorisation to legislate on social assistance for unemployed people and on family allowances, the Constitution compels the federal legislature to adopt legislation. These duties do limit changes on the federal level in so far as the Confederation cannot abolish a social insurance system without a foregoing change of the Constitution. A change of the Constitution affords a double majority (majority of votes and majority of the votes of the Cantons).[25]

If the Federal Parliament does not fulfil the constitutional duties to adopt legislation, there are – apart from political pressure – no means to compel the

[14] E.g. Giovanni Biaggini, Bundesverfassung der Schweizerischen Eidgenossenschaft, Kommentar, Zürich 2007, Art. 41 N 2.

[15] Art. 59 al. 4 and 5 Constitution

[16] SR 833.1 and 834.1.

[17] SR 831.10.

[18] SR 831.20.

[19] SR 831.40.

[20] Ralph Jöhl, Ergänzungsleistungen zu AHV/IV, in Ulrich Meyer (ed.), Soziale Sicherheit, Basel/Geneva/Munich 2006, N 9.

[21] SR 837.0.

[22] SR 834.1.

[23] SR 832.10.

[24] Hans Peter Tschudi, Die Sozialverfassung der Schweiz (Der Sozialstaat), Bern 1986, p. 26 et seq.

[25] Art. 140 Constitution.

legislature to adopt the required legislation. The influence of the Federal Court is limited in this field; it does not have the power to force the federal legislature to act according to the Constitution.[26] The example of the maternity insurance mentioned above shows that even a clear constitutional duty can remain unfulfilled for decades.

1.2.2 State level (Cantons)

Most social security systems in Switzerland are based on federal legislation. The Cantons are still competent in matters of social assistance and health care as far as the provision of sufficient medical infrastructure is concerned. Furthermore, the Cantons fulfil important tasks in the execution of federal legislation.

Since the Cantons are sovereign to organize themselves within the framework given by the Federal Constitution, they all have their own cantonal constitutions. The majority of these constitutions have been revised in the last decades, a couple of the constitutions are still in revision. Most of them include social goals or other norms mandating the Cantons to take measures in the field of social security or in matters closely related to social security. Some of the cantonal constitutions contain social goals going beyond those of the Federal Constitution. Some of the cantonal constitutions also acknowledge social rights which go further than the minimal guarantees in the Federal Constitution.

The Cantons are obliged to grant the prestations vested in the right to aid in distress, which will be dealt with hereafter, to every person on their territory. Some cantonal constitutions go beyond this minimal standard or specify the prestations concerned. In their systems of social assistance, which are based on cantonal legislation, the Cantons all grant a better and higher level of protection than the minimal level acknowledged by the right to aid in distress.

1.3 Subjective rights to social security

Since 1995 the subjective fundamental right to aid in distress has been acknowledged by the practice of the Federal Court.[27] The Federal Court did not mention the International Covenant on Economic, Social and Cultural Rights (ICESCR)[28] and its Article 11 in its leading case. Nevertheless, the connection between the recognition of the right to aid in distress and the task inherent to the Treaty namely to grant access to the courts for its fundamental goals seems obvious.[29]

[26] Art. 190 Constitution.

[27] Federal Court BGE 121 I 267.

[28] SR 0.103.1.

[29] E.g. Jörg Künzli/Walter Kälin, Die Bedeutung des UNO-Paktes über wirtschaftliche und soziale Rechte für das schweizerische Recht, in: Walter Kälin/Giorgio Malinverni/Manfred Nowak, Die Schweiz und die UNO-Menschenrechtspakte, 2nd ed., Basel 1997, p. 130 et seq.

Since January 1, 2000 the right to aid in distress is mentioned in the constitutional catalogue of fundamental rights and freedoms: '*Whoever is in a situation of distress and is not able to take care for himself or herself has the right to aid and assistance and also the right to means indispensable for living in dignity.*'[30]

As a fundamental aspect of human dignity the right to aid in distress grants minimal help to every human being on Swiss territory independent from his or her sex, age, nationality or legal status. Basic condition of the right is an actual and factual situation of distress.[31] Such a situation is given if a person does not have the basic resources for survival in dignity. The right can only be claimed if somebody is not able to help himself.[32] This important restriction is generally understood as an expression of the principle of subsidiarity.

The core problem of this right is the delimitation of the prestations. Which level of social security must be granted to every individual in Switzerland to avoid social exclusion and to ensure a life in dignity? The practice of the Federal Court has shown that the level of protection is lower than the average level of social assistance. For people who are not entitled to stay in Switzerland (e.g. refused refugees) the level can be limited to elementary medical aid, elementary housing and modest but sufficient food.[33] For people who are entitled to stay in Switzerland for a longer period of time the level of protection is higher. It must be high enough to avoid social exclusion for a longer time spread.[34]

The level of protection deduced from the right to aid in distress is rather low. Nevertheless, the right to aid in distress limits the scope of action within legislation. The level of health protection for instance cannot be lowered without respecting a limit for those people who do not have a health insurance.[35] The physical well-being of every person must be ensured.[36]

Apart from the right to aid in distress, no other explicit constitutional rights to social security exist. Other social rights in the Federal Constitution concern the right to a sufficient and free primary school education[37] and – in case of lacking means – the right to free legal assistance and the right to free legal representation.[38]

[30] Art. 12 Constitution.

[31] Biaggini (N 14), Art. 12 N 4; Margrith Bigler-Eggenberger, in Bernhard Ehrenzeller e.a. (ed.), Die schweizerische Bundesverfassung, Kommentar, St. Gallen/Zurich 2008,Art. 12 N 14 et seq.

[32] E.g. Federal Court BGE 130 I 71: A community can even refuse to grant social assistance when a person in need is not willing to take part in a working program. (Federal Court decisions are published in www.bger.ch).

[33] Federal Court BGE 131 I 166.

[34] Bigler-Eggenberger (N. 31), Art. 12 N 35.

[35] See Thomas Gächter, Grenzen der Solidarität? Individuelle Ansprüche auf medizinische Leistungen gegenüber der Rechts- und Versichertengemeinschaft, in Individuum und Verband, Festgabe zum schweizerischen Juristentag 2006, p. 473 et seq.

[36] Federal Court BGE 131 I 166 E. 8.2.

[37] Art. 19 Constitution.

[38] Art. 29 al. 3 Constitution.

Even though further social rights are not explicitly mentioned in the Federal Constitution, some rights can be deduced from the right to equal treatment.[39] In fact, this is only true for matters which are not regulated by federal laws. As far as an inequality in treatment is based on a federal law, the Federal Court is limited in the adjudication of such 'derived' rights. Article 190 Constitution limits the constitutional jurisdiction of the Federal Court as far as federal laws are concerned; the courts have to follow these laws even if they are in contradiction with the Constitution. Only in those cases in which federal laws are in contradiction with international human rights (as contained in the ECHR) the Federal Court does not follow the federal law.[40] Up until now the principle of equality of treatment derived from Art. 14 ECHR or Art. 26 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) has not been a basis for further reaching rights than granted by the national legislation.

1.4 Influence of international law on changes in Swiss social security law

Switzerland has ratified a substantial number of international instruments concerning matters of social security. Normally, these instruments are not signed or ratified until the level of protection granted by the international instrument is reached by national law.[41] Generally speaking, the influence of international law on changes is stronger before a treaty or a convention is signed than afterwards. After the signing and the ratification, the influence on the national practice and legislation is – in most cases – modest.

Switzerland has signed 47 conventions of the ILO.[42] These conventions have had some influence on the development of labour law, especially the protection of labour. In matters of social security the effect of these conventions has never been very strong.

The ECHR had a substantial influence on the development of the judicial procedure in matters of social security. When Switzerland ratified the ECHR it could hardly have been foreseen that the term 'civil rights' in Art. 6 ECHR had to be interpreted in the way that the major part of social security law was covered by it.[43] Apart form these effects on procedural law the ECHR had very little influence on the development of Swiss social security law. The same is true

[39] Georg Müller, in Jean-François Aubert e.a. (ed.), Kommentar zur schweizerischen Bundesverfassung von 1874, Basel etc. 1995, Art. 4 N 21.

[40] Federal Court BGE 128 III 113.

[41] Hans Peter Tschudi, Entstehung und Entwicklung der schweizerischen Sozialversicherungen, Basel/Frankfurt 1989, p. 123.

[42] See the index of the conventions ratified by Switzerland, www.seco.admin.ch/themen/00385/00452/02026/index.html.

[43] See the judgment of the European Court of Human Rights in *Schuler-Zgraggen v. Switzerland* (Application No. 14518/89) from June 24, 1993. See also Ulrich Meyer-Blaser, Der Einfluss der EMRK auf das schweizerische Sozialversicherungsrecht, Zeitschrift für schweizerisches Recht 1994 I, p. 389 et seq.

for other international conventions for the protection of human rights (International Covenant on Civil and Political Rights [ICCPR], etc.).

The set of provisions from the International Covenant on Economic, Social and Cultural Rights (ICESCR) ratified by Switzerland has already been implemented in Swiss legislation. The major influence – or possible influence – of the convention does not lie in the incentives it gives to national legislation; it is more the 'prohibition of regression' following from the progressive concept of implementation of the covenant, which limits the Swiss legislature in going back behind the level of protection achieved.[44] The practice of the Federal Court repeated several times that the provisions of the ICESCR do not have a direct effect on the subjective rights of the individuals.[45] Therefore, it is not probable that the prohibition of regression will successfully be claimed by individuals in proceedings before the Federal Court.

2 Legal duties to respect a 'position' of the individual

2.1 Concept of the right to property

The legal source of the right to property is Art. 26 Constitution. Article 1 of the first protocol of the ECHR has been signed by the Swiss government, but the entire protocol has not yet been ratified.[46] Therefore, the practice of the Strasbourg Court does not have a binding influence on the Swiss concept of the right to property.

According to the Swiss concept, the right to property is twofold: it protects the ownership interests of individuals (*Bestandesgarantie*), and guarantees the right to property as an essential and inviolable feature of the Swiss legal order (*Institutsgarantie*). This twofold nature is extended by the constitutional guarantee of full compensation in case of expropriation or restriction of the right of property resembling an expropriation (Art. 26 al. 2 Constitution).[47]

2.2 Right to property and social security

The right to property protects the individual's ownership interest in land, tangibles, servitudes, patents and rights in the present given situation.[48] While the practice of the Court of Strasbourg recognises the protection of rights on prestations of social security – at least in as far as they are

[44] Künzli/Kälin (N 29), p. 110 et seq.

[45] E.g. Federal Court BGE 130 I 113 E. 3.3 and 126 I 240 E. 2g.

[46] See for the reasons of the lacking ratification Mark E. Villiger, Handbuch der Europäischen Menschenrechtskonvention, 2nd ed., Zurich 1999, N 31.

[47] Fleiner/Misic/Töpperwien (N 1), N 539 et seq.

[48] Fleiner/Misic/Töpperwien (N 1), N 539.

related to contributions to the system[49] – the opinions in the Swiss legal doctrine are divided. Some authors do not extend the protection of the right to property to the prestations of social security;[50] an important and growing minority of authors follows the approach of the Court of Strasbourg.[51] They support a more functional concept of property, which takes into account the crucial importance of prestations of social security for the individuals.[52]

Because most social security systems are regulated by federal laws which are binding on the courts, very few leading cases on this issue exist. Even if a reduction of prestations fell within the scope of protection of the right to property, the Federal Court would be obliged to follow the federal law.[53] Above this, the reduction of prestations has been a rare exception in the last decades. As far as the question has been touched on by the Federal Court, the protection of the insured person has been denied.

A minimal standard of existential prestations is guaranteed – as already mentioned before – by the right to aid in distress. The level of protection of this right is up to a certain extent accessory to the general conditions of life in a given society.[54] Because of this relation to a general social level, the right to aid in distress can limit the reduction of prestations if the reduction has the consequence that a person will be endanger of loosing personal dignity in the context of a given society. Until now, the level of social security has never been lowered to an extent that this – absolute – level has been touched.

2.3 Other concepts with influence on changes in social security systems

There are other different concepts to protect individuals or whole groups of insured persons from unforeseen changes in social security systems. Apart from the concept of rights acquired by a special act and the protection of confidence, they all have the structure of principles giving guidelines to the legislature. Only the two concepts just mentioned could protect individuals from changes even against federal legislation.

[49] Philipp Mittelberger, Der Eigentumsschutz nach Art. 1 des Ersten Zusatzprotokolls zur EMRK im Lichte der Rechtsprechung der Strassburger Organe, Berne 2000, p. 24 et seq. with references to case law; Villiger (N 46), N 669.

[50] Regina Kiener/Walter Kälin, Grundrechte, Berne 2006, p. 285 et seq.; Klaus A. Vallender, in Bernhard Ehrenzeller e.a. (ed.), Die schweizerische Bundesverfassung, Kommentar, St. Gallen/Zürich 2008, Art. 26 N 21 et seq.

[51] Giovanni Biaggini, Eigentumsgarantie, in Detlef Merten e.a. (ed.), Handbuch der Grundrechte, Grundrechte in der Schweiz und in Liechtenstein, Heidelberg etc. 2007, p. 523 N 10; Ulrich Häfelin/Georg Müller/Felix Uhlmann, Allgemeines Verwaltungsrecht, 5th ed., Zurich etc. 2006, N 2046c; Jörg Paul Müller/Markus Schefer, Grundrechte in der Schweiz, 4th ed., Berne 2008, p. 1013.

[52] Biaggini (N 51), p. 523 N 10.

[53] Biaggini (N 51), p. 523 N 10.

[54] Bigler-Eggenberger (N 31), Art. 12 N 34 et seq.

2.3.1 Rights acquired by a special act (Wohlerworbene Rechte)

The main content of some legal positions is specially protected for reasons of the protection of confidence. These legal positions are so strong that they fall under the protection of property rights mentioned above. These rights are either acquired by a special act which must be similar to a contract or have existed for a very long period of time.[55] The latter category of rights has no relation to social security. The former category mainly concerns legal positions acquired by an administrative contract or a legal act similar to a contract. This kind of contract is not used in social security law. The rights and duties of individuals are laid down in objective norms and are normally not part of an administrative contract. Only in cases in which an authority gives guarantees concerning social security benefits to one of its civil servants,[56] could the right fall into this group of rights. Such guarantees are very seldom in practice.

A majority of employed persons in Switzerland are covered by the employee pension plan at a higher level than required by the legal minimum. The insurance at a higher level is only possible when the insured person agrees to it voluntarily. Thus, a situation occurs which is comparable with the situation leading to a right acquired by a special act: the insured person voluntarily makes a higher contribution to the system of the employee pension plan in order to be in the position to draw better benefits. These contractually acquired rights are in principle under the protection of the right to property; nevertheless, jurisdiction shows that changes involving considerable adjustments of the rights acquired by a special act are not prohibited.[57] Even in the employee pension plan (second pillar) one can therefore not speak of rights acquired by a special act in the proper sense.

2.3.2 Protection of confidence

The protection against arbitrariness and the principle of good faith are both fundamental rights (Art. 9 Federal Constitution). The principle of good faith has a threefold content: the protection of (subjective) confidence, the prohibition of abuse of rights, and the prohibition of *actus contrarius* (*venire contra factum proprium*).[58] Only the principle of confidence is relevant in the present context. It says that acts of an authority which are precise and individualised can establish the confidence of an individual. If the individual acts in accordance with the act of the authority, his confidence is protected even if the act of the authority was unlawful.[59]

[55] E.g. Häfelin/Müller/Uhlmann (N 51), N 1008 et seq.

[56] Biaggini (N 51), p. 523 N 9.

[57] E.g. Federal Court BGE 133 V 279.

[58] Fleiner/Misic/Töpperwien, N. 479.

[59] E.g. Häfelin/Müller/Uhlmann (N 51), N 631 et seq.

The principle of confidence is primarily significant in the application of law, not in the legislation. Nevertheless the majority of authors support a concept relating to the clear and specific content of a norm. They accept clear and unconditional provisions in a norm as a basis of confidence.[60] In a very specific case the Federal Court followed this concept and acknowledged the principle of confidence due to an abstract legal norm.[61]

2.3.3 Protection of collective confidence / Security of Law

The principle of security of law has different aspects. In the given context the *calculability* and the continuity of the legal order are at stake. A rule complies with the calculability when it allows citizens planning individual actions to rely on it. It must be clear how the authorities would react based on a given rule. Together with the principle of legality, calculability forces the legislature to take unambiguous decisions and to express them in clear terms. The principle of *continuity* shall protect individuals in their expectation concerning legal changes: Fundamental changes of legislation should not be adopted surprisingly. Individuals must be able to adjust their situation for the change of legislation at an early stage. Although this principle is approved,[62] its enforcement is limited. As to changes of federal legislation, the jurisdiction cannot undertake a control of constitutionality (Art. 190 Constitution). As to changes of cantonal legislation, an intervention is only indicated in severe cases for the principle of continuity is very vague. Nevertheless, there are some cases in which the Federal Court has criticised abrupt changes of legislation of a canton, because no (sufficient) transitional regulations were included.[63]

2.3.4 Protection of acquired rights

Acquired rights (*Besitzstand*) mean that a currently guaranteed legal position remains, even though the new right applicable to the case does not provide such a position. The protection of acquired rights has a twofold characteristic: it is a concept of legal coordination and at the same time a (possible) concept for transitional measures.

In the coordination law the protection of acquired rights is important in those cases in which a change occurs by the determination of the insurer primarily bound to render benefits. Article 24 al. 4 of the law on disability insurance may be cited as an example: If the disability insurance mandates a retraining concerning a person having drawn daily allowance from the accident insurance,

[60] E.g. Häfelin/Müller/Uhlmann (N 51), N 631; Alfred Kölz, Intertemporales Verwaltungsrecht, Zeitschrift für schweizerisches Recht 1983 II p. 135 et seq.; Beatrice Weber-Dürler, Vertrauensschutz im öffentlichen Recht, Basel/Frankfurt a. M. 1983, p. 280 et seq.

[61] Federal Court BGE 122 V 405 E. 3a/bb.

[62] E.g. Häfelin/Müller/Uhlmann (N 51), N 343.

[63] See the cases quoted in Häfelin/Müller/Uhlmann (N 51), N 343 et seq.

the daily allowance during retraining has at least to correspond to the daily allowance drawn from the accident insurance so far.

Up to now, the protection of acquired rights has not reached the status of a general principle of law. The jurisdiction explicitly refuses in its constant practice to acknowledge the protection of acquired rights as a principle of law.[64] It is also not to be expected that this acknowledgment will happen, because the protection of acquired rights would entail substantial financial consequences. The protection of acquired rights can only be applied if provided by law. The guiding idea of the protection of acquired rights, i.e. that benefits from a social insurance shall not be undercut by benefits from another class of insurance, may be considered as an incitement to the legislation to prevent as far as possible an objective, not justified subsidence of the benefit level.

In case of changes of the law, it is incumbent on the legislature to take care of an appropriate protection of law and the protection of confidence respectively, the confidence in consistency of the persons affected by the new provision has to be weighed against the reform interests of the legislature. Even if difficulties regarding transitional law are mainly subject of the legislature competence, interests of confidence (legitimate expectations) and legal certainty of every individual may not be ignored. Within the doctrine there are quite elaborate concepts on how to systemise and weigh the adverse interests caused by transitional law conflicts.[65]

2.3.5 Equality and equal treatment

Also the principle of equality and equal treatment can limit the scope of action of the legislature: Persons in comparable social circumstances may not be treated differently without objective causes. Within the scope of reforms, the legislature shall therefore not create unjustified inequalities.

Moreover, reforms must not lead to equal treatment in cases in which substantial factual differences demand diversity in provision. Especially within the usually rather schematic conditions of the claims in the social security law, the mandate to differentiate can rarely be applied to the full.

[64] Federal Court BGE 124 V 271 E. 2b.

[65] The most elaborated concept was developed by Ralph Jöhl, Übergangsrechtliche Probleme im Leistungsrecht der Sozialversicherung, St. Gallen 1996. See for the dogmatic foundation Kölz (N 61).

3 Legal changes and transitional measures

3.1 Dogmatic approach towards transitional measures

The legal dogmatic towards transitional law and transitional measures is quite unanimous in certain points.[66] Nevertheless, this consensus is based on a rather abstract level. Specific rules and schemes on how transitional measures should be enacted have not yet been developed even though this lack was recognized more than 25 years ago.[67]

Apart from the already mentioned legal concepts with influence on legal changes, the principle of *proportionality* is one of the most important guidelines in the making of transitional rules. The consensus of the legal opinions based on these concepts and principles can be summarised in a couple of points which are also contained in the federal guidelines for a sound legislation:[68]

- A law regulates the legal effects of those facts of the case that occur at a time during which the law is in force.
- Facts of the case which take place after the coming into force of a law will be judged according to the new law.
- The retroactive effect (*Rückwirkung*) of a law is excluded. Only in special cases and under specific conditions[69] may an order tie onerous legal consequences to a state of facts in the past.
- Facts of the case which last over a definite or indefinite period of time or which take place in several temporally separated episodes will be judged according to the new law for the time period after the coming into force of the new law. This pseudo retroactive effect (*unechte Rückwirkung*) is allowed. Yet, the already mentioned principles of security of law and confidence are authoritative for the concretion of the transitional law. Above this, the general principle of proportionality must be borne in mind.
- As to laws regarding facts of a case which last for an indefinite period of time, it must be considered whether the immediate application of the new law is justified. The principle of proportionality may be opposed to an immediate application. First of all, this is the case when the new order differs strongly from the old order. In such cases it may be justified to create a transitional arrangement. This transitional measure shall build a bridge between the old and the new law. Such a transitional measure gives consideration to the principles of legal security and proportionality.
- In terms of procedural law the basic principle is that by the time of its coming into force procedural law is applicable to the current proceeding.

[66] Häfelin/Müller/Uhlmann (N 51), N 310 et seq.; Pierre Tschannen/Ulrich Zimmerli, Allgemeines Verwaltungsrecht, 2nd ed., Berne 2005, p. 173 et seq.

[67] Kölz (N 61), p. 112 et seq.

[68] Bundesamt für Justiz, Gesetzgebungsleitfaden, 3rd ed., Berne 2007 (www.bj.admin.ch > Themen > Staat und Bürger > Legistik), N 655 et seq.

[69] Details in Häfelin/Müller/Uhlmann (N 51), N 331; Gesetzgebungsleitfaden (N 68), N 655.

3.2 Usual structure of transitional measures in social security law

Matters of transitional law are usually not in the centre of the legislation.[70] Particularities of transitional measures of a law are hardly ever the subject of parliamentary debates. Basically the structure of transitional measures in social security follows the general principles mentioned above.

The characteristics are to be found in the fact that in social security law often facts of a case lasting an indefinite period of time are to be judged. Therewith the pseudo retroactive effect of a new law almost represents the standard, especially when benefits for an indefinite period of time shall tie to insurance periods already acquired or to expectancies. Particularly in pension schemes it is not unusual to establish a transitional measure with special provisions. The same applies to the adoption of new legal institutions or new kinds of benefits: In order to be effective for all insured persons, often an introductive transitional measure is necessary.

Up to now benefits of social security were rather extended than reduced. For this reason the new law was normally more favourable than the old law. Speaking of transitional measures this is less problematic than the restriction of legal positions. An authoritative guideline for the limitation of benefits is the principle of equality and equal treatment. The more favourable rules may only be withheld to certain classes of insured persons for severe and objective reasons.

On the limitation of benefits, the already mentioned principles are consulted as guidelines. Often attention is paid that the amount of the benefits already drawn will not be changed significantly. This *protection of acquired rights* is – as already mentioned above – rather a political maxim than a principle of law.

The adoption of new procedural law does not often involve explicit transitional rules. The practice had to decide according to which criteria in proceedings of social security law new procedural law had to be applied.[71] Pursuant to the jurisdiction, new procedural provisions are basically applicable immediately and to the full extent with, and on the day of, coming into force unless the new law contains different transitional measures. This principle of transitional law is not applicable if there is no continuity between the old and the new law in respect of the procedural law systems, and if with the new law a fundamental new code of procedure has been created.[72] Furthermore, according to the principle of irreversibility of the forum (*perpetuatio fori*), the competence of the court is determined after the point in time in which the procedure has been opened.[73]

[70] Ulrich Meyer/Peter Arnold, Intertemporales Recht. Eine Bestandesaufnahme anhand der Rechtsprechung der beiden öffentlich-rechtlichen Abteilungen des Bundesgerichts und des Eidgenössischen Versicherungsgerichts, Zeitschrift für schweizerisches Recht 2005 I p. 116.

[71] Meyer/Arnold (N 70), p. 135 et seq.

[72] E.g. BGE 129 V 115 E. 2.2.

[73] Meyer/Arnold (N 70), p. 137.

An exception only applies if the competent authority at the time of the opening of the procedure does not exist anymore.[74]

3.3 Actual legal changes introduced and accompanied by transitional provisions

Up to now, in the field of social security an extension of benefits could be observed far more often than a reduction of benefits. In case of an extension of benefits, i.e. advances of pensions, the transitional law normally defines from when and under which conditions additional benefits shall be granted. Usually, higher benefits became effective with the coming into force of the new regulation or shortly after. Advances of pensions in the compulsory old-age and survivors insurance may be mentioned as examples. Also the expansion of the insurance obligation to all employees in the accident insurance, which came into force with the new law on accident insurance in the year of 1984, obtained immediate validity and granted the persons concerned an advantageous solution without a transitional period.[75]

Occasionally, a special rule has been created for more favourable extensions of benefits. The 10th revision of the law on old-age and survivors insurance implemented in 1997 provides education benefits for times in which one assumes the parental care for a child under the age of 16. These benefits lead to an increase of pensions. Basically, the credits were granted in their entirety for all times after the coming into force of the law. For the educational periods before that, a transitional regulation was created. The credits for the time before 1997 had been taken only to the moiety. In addition, there was a graduation on age-group regarding the question who could receive credits for which number of years. The older the persons were, the more years which could have been credited.

Only in recent years have reforms implicated noticeable reductions of benefits. Some examples on this include:

- With the 10th revision of the Federal Law on old-age and survivors insurance[76], the age of retirement for women was basically increased from 62 to 64 years. Four years after the coming into force of the revision, the age of retirement was increased from 62 to 63, eight years after the revision from 63 to 64. At the time of the coming into force of the revision the women expecting their retirement in four or more years knew that they would have to work one year longer. Women expecting their retirement in eight years or more knew that they would have to work two years longer altogether. Therewith, both groups had enough time to adjust to the modified circumstances.
- With the first revision of the Federal Law on old age, survivors and disability insurance for employed persons[77] in 2005, the mode of calculation of pensions was altered. Future pensions will be around six percent lower. Pensions which were fixed before the coming into force of the revision will not be touched by the new method of calculation. Over the next ten years the calculation will be adapted in small steps. Only persons who were at an age of less than 55 (men) or 54 (women) in the year 2005 will have a full reduction at the age of their regular retirement with 65 or 64 years.
- With the fifth revision of the Federal Law on disability insurance[78], which came into force on January 1, 2008, the conditions for a disability pension have been aggravated. Many norms have been changed in a way to motivate the insured persons to participate more in their reintegration. It seems astonishing that a revision changing a majority of articles in an important law is not attended by a whole set of transitional provisions. One of the few transitional rules concerns the protection of acquired rights of the daily allowances for persons taking part in a reintegration program of the disability insurance. For the rest, the revision shall be effective in a very short time after its adoption. The disability insurance has enormous financial problems and the political priority has been to avoid a substantial amount of new expenses. It will be interesting to see whether and to which degree the new conditions will have consequences for insured persons already receiving a pension. It is possible that the new conditions will be applied on these pensions by the way of revision, which is always possible when important factors of the calculation of a pension change.[79]

These few examples show that the legislature in social insurance law tries in most cases to implement the guidelines which can be deduced from constitutional law. The general rules for the shaping of transitional provisions are observed. Only the example of the fifth revision of the Federal Law on disability insurance will give rise to questions in practice. Especially the revision of invalidity pensions which were fixed many years ago could be in contradiction with some of the guidelines mentioned above.

3.4 Stability of transitional measures

Neither legal practice nor legal doctrine has developed special concepts on how to deal with the change of transitional provisions. In principle, transitional provisions are regular legal norms. The guidelines explained above apply to transitional provisions as to other legal norms.

[74] BGE 130 V 90 E. 3.

[75] Jöhl (N 65), p. 135 et seq.

[76] SR 831.10.

[77] SR 831.40.

[78] SR 831.20.

[79] Art. 17 of the Federal Law on the general part of social insurance, SR 830.1.

Nevertheless, there is a difference between ordinary legal norms and transitional norms. The latter try to solve a transitional problem for a given class of individuals whose interests are specifically protected in a situation of a legal change. They normally concern a limited number of individuals. The transitional provisions are sometimes very important for these individuals. A person planning retirement some years in advance must be sure that the transitional measures concerning the adaptation of the age of retirement can be relied on. The same is true for provisions altering the mode of calculation of pensions step by step. As soon as provisions of this kind have entered into force, individuals must be able to make use of their remaining period of professional activity to fill the gaps in their level of pensions. It cannot be excluded that the courts would protect the individual confidence (Art. 9 Constitution), based on a rather specific and clear transitional measure, against a change of the transitional measures. Until now, the Federal Court has never taken a decision of this kind against a Federal law. The theoretical arguments for a protection of individual confidence in a legal norm are already discussed and supported by a number of authors.[80]

In the recent past, there have only been a limited number of adaptations of transitional provisions in social security.

- Within the fourth revision of the Federal Law on disability insurance[81] in 2003, the additional pensions for marital partners have been abolished. Based on a transitional provision, the current additional pensions were not concerned. Insured persons who were entitled to an additional pension by the entrance into force of the revision did not loose their entitlement. Within the fifth revision of the same law, the additional pensions will be abolished for this privileged group as well on January 1, 2008. For the persons concerned, this change could have significant financial effects. Normally, they should be given enough time to adapt their lives and expenses to the new situation. In this special case, the sudden abolition of these pensions can be justified with a view to the fact that the persons concerned have known since 2003 that it is contrary to the general system to get an additional pension. The persons concerned could not rely on the confidence that the legislature would not change this privilege. In the end, they had a period of five years to take the necessary steps to adapt to the new situation.
- The compulsory system of health insurance was introduced for all inhabitants of Switzerland in 1996. The transitional provisions have introduced a system of compensation for bad risks between the health insurers. This system was limited in time. The legislature expected an assimilation of risk structure of the different insurers. This expectation turned out to be wrong. Therefore, the system of risk compensation was prolonged for another five years.[82]

[80] See N 61 above.

[81] SR 831.20.

[82] Art. 105 al. 4bis of the Federal Law on health insurance, SR 832.10.

4 Executive-branch regulations

The executive branch is very important for the concretion of social security law. All laws are supplemented by a great number of ordinances. Besides, there are self-governed regulations of social insurance bodies which cannot be attributed to the government administration. Finally, there is also a large number of guidelines which support the implementation of social security law. These are not sources of law in the proper sense, but they serve the equal application of the law.

The regulations of the executive are enacted either by reason of a special delegation[83] or due to the general competence of implementation of the administrative authorities.[84] In the former case the administration is bound within delegation, in the latter it is bound to the scope of implementation set by the entire order. In the latter case the regulations may not impose new rights and duties on individuals, which are not already embodied in the law. Normally, the litigation whether the legal scope of delegation or the entire order has been observed is not about problems and questions of transitional law. With regard to the principles described in Parts 1–3, these are the same.

The older practice of the Federal Court declared the executive bodies entrusted with the implementation of legislation competent to adopt transitional provisions. As far as the formal law did not contain this kind of norms the executive bodies should be allowed to create them. This practice was in contradiction with the principle of legality. A change of practice seems probable.[85]

The self-governed regulations of social insurance bodies are basically judged according to the same principles as well. All the same the social insurance bodies possess somewhat greater autonomy in arranging their regulations than the authorities. They still are bound to the legal regulations; major changes are only possible in connection with exceptional cases. The most important changes may occur within the employee pension plan (2nd pillar) when benefits are adjusted by self-governed regulations. The most recent practice shows that major changes are also possible without the consequence that principles are thus considered as hurt.[86] This jurisdiction is not entirely satisfactory, especially in domains in which an intervention regarding the equivalence between contributions and thereby acquired expectancies or benefits takes place.

Guidelines from supervisory authorities conducting the implementation of social security are legally binding only for administrative authorities. If the guidelines are evidently incorrect, even the administrative authorities may diverge from them.[87] Moreover, the guidelines oblige neither the courts nor the individuals. An adjustment of the guidelines therefore has no direct implica-

[83] See Art. 164 al. 2 Constitution.

[84] Art. 182 al. 2 Constitution.

[85] Häfelin/Müller/Uhlmann (N 51), N 3244a with further references.

[86] Federal Court BGE 133 V 279.

[87] Thomas Locher, Grundriss des Sozialversicherungsrechts, 3rd ed., Berne 2003, p. 97 et seq.

tions on the insured persons. Furthermore, no new rights or duties of individuals may be established. So, the legal questions are to be asked basically differently from those concerning laws and regulations.

5 Concluding remarks

The Swiss constitutional law of Federation and Cantons contains numerous regulations which authorise and require the State to adopt measures in the interest of social security. The right to minimal provision of goods indispensable to life is a basic right. It cannot be limited by changes in legislation. Above all, a great part of the doctrine postulates that certain legal positions in the range of social security shall be mandated under the protection of the right to property.

The obligations of the State beyond the minimal guarantees are by contrast rather vague. Normally, these obligations concern flexibly applicable social goals, which do not contain individual rights to governmental benefits. Furthermore, they do not provide an enforceable protection against changes in legislation to the disadvantage of citizens.

Based on general principles of law and the constitution, in Swiss doctrine and practice certain guidelines concerning the introduction of legal changes have been developed. Since the Swiss legal system lacks of a control of Federal laws by the Federal Court[88] and most questions of social security are regulated by Federal law, clear decisions of the highest Court are missing regarding which changes in the system of social security are allowable and which are not. A control of the measures arranged in Switzerland by the European Court of Human Rights is only possible to a limited extent, because Switzerland has not ratified the first additional protocol of the ECHR. The right to property embodied therein could – according to the jurisdiction of the European Court of Human Rights – grant certain protection against reductions of benefits funded by contributions.

The principle of security is not developed to an extensive degree under Swiss social security law. The reasons for this seem to be twofold: The first reason consists in the fact that up until the last five years, the prestations have always been extended. Therefore there was until now no academic debate about the legal barriers of reduction of prestations. More important than the principle of security were the social goals or the principles of equality and proportionality, which must be borne in mind by extending the level of prestations. The second reason lies within the already mentioned characteristic of the Swiss system of legal protection, namely that Federal Laws may not be mandated under the control of the Federal Court. Therefore, no enforceable aspects of the principle of security can be strengthened.

[88] Art. 190 Constitution.

1 Discretionary powers of the administration and their limits

1.1 Preliminary remarks

Social security is to a great extend part of public law. Therefore it is strongly affected by the principle of legality (Art. 5 al. 1 Constitution[89]). This means that when granting benefits, institutions are bound by the law and its regulations. Therewith, premises under which benefits of social security are granted are generally set by the law.[90] In the same way it is the law which defines character and scope of the benefits.[91]

However, this basic principle is not strictly followed, and the reason for it can be traced back to different causes:

- First of all, it is acknowledged that when granting benefits, the legal basis does not have to reach the same degree of precision as in governmental interventions. The same precision is however needed for benefits which are granted periodically, or are of existential value to the persons concerned.[92]
- Secondly, one must differentiate between benefits granted by the social security and benefits granted by social assistance (welfare aid). Given that benefits from welfare aid depend on the need of the individuals, discretion when granting them is likely to be larger.[93] In the following both categories will be considered separately.
- Eventually, federalism and the organisational splintering of social security execution play an essential role. A certain margin of appreciation is given to cantons and individual social security institutions regarding the implementation of social security law.

[89] The Constitution of the Swiss Confederation of April 18, 1999 (Constitution), Official systematic Collection of Swiss Legislation (SR) 101. See for an (inofficial) english translation of the Constitution http://www.admin.ch/ch/itl/rs/1/c101ENG.pdf.

[90] Thomas Locher, Grundriss des Sozialversicherungsrechts, 3rd ed., Berne 2003, p. 87 et seq.

[91] Alfred Maurer, Schweizerisches Sozialversicherungsrecht, Band I, Allgemeiner Teil, 2nd ed., Berne 1983, p. 153 et seq.

[92] Locher (N 90), p. 88; Ulrich Häfelin/Georg Müller/Felix Uhlmann, Allgemeines Verwaltungsrecht, 5th ed., Zurich/Basel/Geneva, N. 416.

[93] Felix Wolffers, Grundriss des Sozialhilferechts, 2. ed., Bern/Stuttgart/Wien 1999, p. 103.

1.2 Discretionary power in the shaping of autonomous rules

The essential parts of social security law fall into the central state's authority.[94] Nevertheless, there are several portions left to the cantons for agreeing on adapted cantonal solutions. Two of the most significant examples for such regulations are the individual reductions of contributions to health insurance[95] and the regulation for a small number of factors having an influence on benefit amounts in the system of complementary benefits to the pensions of old- age, survivors and disability insurance.[96]

Of more importance than the provisos for cantonal law are the institution's scopes for regulations. In regard to the organisation, the Swiss system of social security is strongly split up. Most systems of social insurance are administrated by several institutions, which creates a climate of competition such as in the case of i.e. the case in the health insurance and (partially) in the accident insurance system. These institutions are predominantly organised under private law. Their interior structure is predetermined only to a low degree by the social security law. Already from there it follows that a given degree of independence is connected to the embodiment of their activity. Nevertheless, boundaries to this independence appear mainly in the sectors of health and accident insurances where premises for benefits are broadly regulated by the law. Independence in granting benefits is therefore first and foremost limited to the sector of complementary (non-compulsory) health and accident insurance.

On the other hand, regulations within the sector of old-age, survivors and disability insurance for employed persons are of great importance. Contributions and amount of benefits in the so- called 'second pillar' are mainly determined by the pension fund's autonomous regulations.[97] Here the law remains with setting minimum regulations to comply with.[98] However, discretion for pension funds is still limited by their own regulations which they are obliged to follow.[99] Nevertheless there remains a considerable freedom of choice in certain cases. One of the main reasons for this is certainly that pension funds were from the beginning organised under private law, that they were free in regulating the contributions and the prestations, and that minimum standards for their level of contributions and prestations were implemented less than 25 years ago (1984).

94 See Part I, 1.2.1.

95 Art. 65 et seq. of the Law on health insurance (SR 832.10).

96 Art. 2 al. 2, Art. 10 al. 2, Art. 11 al. 2, Art. 13 of the Law on complementary benefits (SR 831.30).

97 E. G. Hans-Ulrich Stauffer, Berufliche Vorsorge, Zurich/Basel/Geneva 2005, N. 254.

98 Art. 6 et seq. of the old-age, survivors and disability insurance for employed persons (BVG, SR 831.40).

99 Maurer (N 91), p. 154 et seq.

1.3 Discretionary powers in the granting of benefits in social insurance

Swiss social insurance law makes a distinction between cash benefits and benefits in kind. Cash benefits are in particular daily allowances, pensions, annual complementary benefits and destitute compensations (Art. 15 of the federal law on the general part of social insurance [ATSG][100]). Benefits in kind on the other hand are in particular curative treatment (nursing), adjuvant, individual care and rehabilitation measures, as well as expenses for transportation and similar benefits (Art. 14 ATSG).

Characteristically cash benefits are regulated very explicitly in regulations and by-laws. The administration has hardly any discretionary power when it comes to granting cash benefits. Constrictions to this policy only result from the before-mentioned particularities concerning the scope available to the cantons in forming benefits, and the fact that benefits from the pension funds are defined regarding the respective regulations instead of legal clauses. All the same, special rules from cantons as well as regulations from pension funds are of a very appointed character, which means that one can by no means speak of a discretionary power as such concerning the implementation of the law.

Benefits in kind have to be considered differently. Premises are still mentioned by the law but a bigger scope is left for the institutions to act. Generally, a benefit in kind is used to impact on the insured person or his/her surroundings in order to allow the person a reintegration in the respective surroundings.[101] Normally, benefits in kind aim for an elimination of the consequences generated by a social risk (such as illness, accident, unemployment). When deciding for which person which measures can be taken, the estimation of the given situation by the institution plays an important role.

To give an example of where the administration still has a certain scope in granting benefits, the measures of the manpower market in the unemployment insurance can be named.[102] Regulations concerning unemployment insurance have numerous benefits helping the insured to integrate into the manpower market (again). Although the law states a legal claim for these benefits to the persons concerned, cantonal administrations retain a choice of discretion of which measure seems most suitable for an insured person.[103]

A similar statement can be made for the integration benefits from disability insurance. Also a claim is generally granted if the qualifications are fulfilled.

100 SR 830.1.

101 See Ueli Kieser, ATSG-Kommentar, Zurich/Basel/Geneva 2003, Art. 14 N. 4.

102 Art. 59 et seq. of the Federal Law on unemployment insurance (SR 837.0).

103 See for a detailed analysis Agnes Leu, Arbeitsmarktliche Massnahmen im Rahmen der Arbeitslosenversicherung der Schweiz, Zurich/Basel/Geneva 2006, p. 38 et seq.

However, looking at the selection process of a certain measure for a client, authorities of the disability insurance have considerable discretionary power.[104]

Now with the 5th revision of the Federal Law on disability insurance[105] a real discretionary power has been introduced into the disability insurance system: Following the explicit intention of the legislature, there is a discretionary power of the administration for granting measures concerning early intervention measures.[106] These measures are intended to be taken at an early point of time so persons can be affected in advance in their disintegration due to health or other problems.

Benefits in kind in health insurance are described clearly and in a final way by the law and several decrees and by-laws. Institutions have no discretionary power in deciding if benefits will be granted or not. However, looking at the facts shows that due to competition between health insurers, benefits are granted which do not precisely fall in a certain class of legal benefits. This practice is unlawful,[107] is in contradiction to the principle of legality[108] and in general it can only be avoided by means of control over health insurers.

1.4 Discretionary powers in the granting of social assistance

As mentioned earlier, the cantons are in charge of social assistance.[109] Therefore many different systems have been created throughout the cantons. One thing all systems have in common is the continuous extension of pretensions to welfare aid into legal claims.[110] In all cantons, individuals have legal claims to defined benefits exceeding the minimum of Art. 12 Constitution.[111]

The margin within this issue is to be divided into three different kinds:

- Benefits of social assistance can either be granted as cash benefits or benefits in kind. Most systems aim for individually adapted cash benefits being granted in the first place in order to allow persons in need to purchase goods they need themselves.[112] Nevertheless almost all cantons provide the opportunity to grant welfare aid to persons in need by supplying them directly with benefits in kind instead of cash. Generally the administration has discretionary power to decide if premises are existent for granting benefits in kind. Usually, such discretionary decisions can be checked by a cantonal court; however, the courts restrain themselves strongly in doing so.
- Moreover, personal aid in cases where the distress is not only of a financial nature is granted in all cantons along side the benefits needed for economic requirements. These prestations are, for example, advisory services or certain integration measures. Corresponding to the statements made regarding the integration benefits of the unemployment insurance and the disability insurance, it can be said that discretionary power to decide which personal, individual aid is to be granted is more extensive than discretionary power in granting financial help.[113]
- However, in practice the largest margins of discretionary power lie in the appraisal of the needs required by a person. Even if the law describes at times exactly which factors (income, capital, expenses) are to be considered when measuring the indigence, there is a considerable margin in how detailed clarifications are done by the respective administration. This is no discretionary power in the legal sense but a result of differences in the practical execution. These differences in practice can lead to different degrees of welfare aid in cantons although legal regulations are similar to each other.

To conclude, it is to be said that discretionary power of administrations is by far more substantial in the field of social assistance than it is in social insurance law.

1.5 Limits of discretionary power

The absolute limit of discretionary power in granting benefits is given by the right to aid in distress. Under no circumstances can discretionary power be misused in a way that violates the minimal guaranty of Art. 12 Constitution.[114] Because administration has, as shown before, mainly discretionary power in the area of in kind benefits and personal aid, the aspects regarding personal assistance and care mentioned in Art. 12 Constitution are of major importance in limiting the discretionary power.

As far as discretionary power is available to institutions and administration, it has to be carried out dutiful. This implies a strict adherence to constitutional principles (Arts. 5 and 9 Constitution) and includes in particular also the principle of proportionality. Because administration and institutions can only grant different benefits when factual reasons are apparent, the principle of equality before the law (Art. 8 Constitution) is of importance too. It follows that legal boundaries exist even in areas with amounts of remaining discretionary power.[115]

[104] Ulrich Meyer, Bundesgesetz über die Invalidenversicherung (IVG), Rechtsprechung des Bundesgerichts, Zurich 1997, p. 56 et seq.

[105] SR 831.20.

[106] Art. 7d al. 3 of the Federal Law on disability insurance.

[107] See Art. 34 al. 1 of the Federal Law on health insurance (SR 832.10).

[108] Locher (N 90), p. 88.

[109] See Part I, 1.2.2.

[110] Wolffers (N 93), p. 90 et seq.

[111] See Part I, 1.3.

[112] Wolffers (N 93), p. 128 et seq.

[113] Wolffers (N 93), p. 124.

[114] Part I, 1.3.

[115] E.g. Häfelin/Müller/Uhlmann (N 92), N. 441 et seq.

Regarding the granting of benefits, cases can normally be controlled upon discretionary power by courts of lower instance. Nevertheless control of discretionary power is, in all cases, carried out with abstinence.[116] This distinct judicial self-restraint in reviewing the discretion of administrations strengthens the power of the administration.

2 Administrative decisions and legal changes

The general problem of legal changes and their effect on existing legal relationships has already been discussed;[117] however, individual aspects of protection for legitimated expectations have been examined in their general relation to the legal system. Now the point is to see what impact a legal change at a later point in time has upon an administrative decision which has already been taken. Moreover, this section is not about the case where a decision is already faulty at the time of its pronouncement; this question will be treated in Section 3. Here it concerns fully correct decisions which seem questionable only through a subsequent legal change.

2.1 Singular and short termed prestations

An administrative decision is usually valid under the law in force at the moment when it is taken. Even when legal changes occur shortly after the decision, it is assessed under the law in force at the moment when it was rendered. On the other hand, decisions with consequences (of a normally financial nature) continuing when the new law becomes effective are treated differently. These are prestations granted for a long-term period of time (e.g. pensions and destitute compensations) and will be discussed in Section b.

Social security law includes many prestations which are specifically granted for a certain function at a certain point in time. Examples are the costs for health care or measures in the manpower market. As far as qualifications are fulfilled for the granting of benefits, a new law can under no circumstances effect a reimbursement or an additional granting of benefits. A retroactive effect of that kind would violate basic constitutional principles such as those already mentioned in Part I.[118]

2.2 Long-termed prestations

On the other hand, the termination of prestations in kind granted for a long-term period of time (such as re-education in disability insurance or long-lasting health treatments from accident or disease) cannot be

[116] E.g. Häfelin/Müller/Uhlmann (N 92), N. 473 et seq.

[117] Part I, 3.

[118] Part I, 2. 3.

barred in the case of a new law coming into force which no longer contains the relevant prestations. However, a constriction would have to be explicitly intended by the new law and could not affect the general minimal standards of protection derived from the constitution.

It is to say that as far as the Federal Law on the general part of the social insurance law (ATSG) is applicable,[119] valid long-term benefits can only be reduced or abrogated when the basis of the facts changes (Art. 17 al. 2 ATSG). It follows from the explicit reference to the basis of the facts that prestations cannot be reduced or abrogated by a simple legal change; at least if no explicit provision of the new law contains a different provision.[120]

In practice the most important cases of long-term prestations are pensions. Changes can affect disability pensions in particular. Concerning their adaptation, there is a special clause in Art. 17 al. 1 ATSG. It says that disability pensions are to be adapted when the grade of disability has changed in a significant way since the adjudication of the pension. The grade of disability is defined by the comparison of the income a person could earn without health damages and the income a disabled person could still earn. Basis for the calculation of the disability pension is an economical comparison between two incomes. Therefore, the assumption that only changes in the factual basis and not subsequent changes of the law can lead to an actual adaptation of the pension is justified.

As mentioned in the first part, regulations regarding the legal situation of disability have been adjusted by the 5th revision of the Federal Law on disability insurance, in force since January 1st 2008. With the restatement of Art. 7 ATSG (incapacity to work) requirements for disability[121] should be tightened in the future. This is a legal change which should not have any effect on disability pensions which are already paid. Nevertheless, it is probable that due to tightened practice, disability is appraised tougher under the new law. Therefore, a reappraisal within the revision would lead to a tightened assessment of the grade of disability. It follows that in a concrete case, a tightening of the legal basis could very well lead to an indirect adaptation of the disability pensions.

Article 17 ATSG is not valid for the sector of the federal system for old-age, survivors and disability insurance for employed persons (second pillar), but similar warranties can be deduced from the transitional law of this system: Generally, prestations already granted are immune against later adaptations by the law (Art. 91 of the Federal Law on old-age, survivors and disability insurance for employed persons [BVG][122]). Moreover, special attention was given in not

[119] Following the system of applicability based on Art. 2 ATSG, the Federal Law on the general part of social insurance law is – generally speaking – applicable in all federal systems of social security except the federal system for old-age, survivors and disability insurance for employed persons.

[120] Kieser (N 101), Art. 17 N. 5.

[121] The restatement of the notion of incapacity to work is relevant as well for clauses of disability through the link in Art. 8 al. 1 ATSG.

[122] SR 831.40.

touching currently running disability pensions within the first revision of this law.[123]

3 Binding effects of administrative decisions

3.1 Preliminary remarks

Being to a great extend part of Swiss administrative law, its principle that administrative decisions become formally valid when they cannot be contested anymore is also true for social security law. Yet these acts can still be contested under specific conditions.[124] However, a countermand can only be considered when the administrative decision is an incorrect one.[125] This constellation has to be distinguished from the case where facts which would have led to another decision only come to light after the administrative decision has been taken. In those cases a revision of the relevant decision can be demanded from persons affected by it (Art. 53 al. 1 ATSG). Since these revisions are based on demands of the insured persons and generally lead to more favourable results, they will not be treated here any further.

In either case consideration of the interests is needed for abrogating or revising an administrative act. Interests being weight against each other are the interest for correct application of the law against the interest for security of law and protection of confidence.[126] Excluded from the possibility of alteration are only certain types of administrative acts. Just two of these types must be considered in conjunction with prestations from social security law: on the one hand, there is the case where a legal decision concerning the administrative act has been taken by a tribunal;[127] on the other hand, the law itself can include a clause which prohibits a revocation for certain acts.[128]

3.2 Binding effects concerning the affiliation to a social security system

Swiss social insurance law knows only three categories of insured persons: unemployed persons, employed persons and self-employed persons. Depending on additional qualifications (such as a certain minimum salary or a minimum age required for pension funds) classification for a social system is determined within these three categories. The qualification of an occupation follows in general the qualification by the legal old-age insurance, where all

[123] Transitional provision within 1st Revision, lit f. al. 1

[124] See Part II, 3.5.

[125] E.g. Häfelin/Müller/Uhlmann (N 92), N. 998.

[126] E.g. Häfelin/Müller/Uhlmann (N 92), N. 997.

[127] E.g. Häfelin/Müller/Uhlmann (N 92), N. 1025 et seq.

[128] E.g. Häfelin/Müller/Uhlmann (N 92), N. 1005 et seq.

categories of persons are insured. Therefore the decision of the authorities of the old-age insurance is of major (factual) importance. In particular the distinction between employed persons and self-employed persons has an impact on the compulsory protection of insured persons: Self-employed persons are only affiliated with the compulsory public insurances for the whole population (old-age insurance, disability insurance, health insurance), whereas employed persons are protected by more specialised and broader developed employee insurances such as accident insurance, unemployment insurance and old-age, survivors and disability insurance for employed persons (pension funds).[129]

Certain flexibility is also characteristic of the system of affiliation: The affiliation with a system does not follow a person; it follows the qualifications of any single occupation of a person. Therefore it is not unusual that a person is considered for different occupations as employed and self-employed at the same time.

Even if the classification of an occupation is important it never has a definite character. A classification to a certain social security system is only valid as long as important facts or criteria regarding the occupation do not change. Insofar classification to a certain system does not play such an important role as may be the case in other countries.

Nevertheless it can be said that for reasons of legal certainty, changes from qualifications of occupations in self-employed and employed are rarely undertaken by the responsible institution of the old- age insurance.[130] Therefore the first classification of an occupation into a certain category is of factual importance as long as the occupation does not undergo an important change (e.g. employment of a formerly self-employed person by a company for the same occupation).

3.3 Binding effects concerning the granting of benefits

There is a consistent regulation for binding effects on an administrative act for branches of social insurances bound by Federal Law on the general part of the social insurance law. As per Art. 53 al. 2 ATSG, an insurance authority can get back to a formal valid act if it is unquestionably incorrect and a rectification is of significant value. The formulation of the just mentioned premises is – in comparison to the general premises for revocation of administrative acts – slightly more restrictive. An administrative act is unquestionably lacking in correctness when the law is applied in a wrong way. Not seen as obviously incorrect is an administrative act where only the administrative practice has since changed or when discretion has been carried out in an unusual way. Moreover it must be pointed out that the decision if a revocation is of considerable value can not be schematised. A slight discrepancy from a long-term

[129] Locher (N 90), p. 165 et seq.

[130] Ueli Kieser, Schweizerisches Sozialversicherungsrecht, Zurich/St. Gallen 2008, N. 45.

granted pension can for instance be of considerable value. By no means are high demands to be placed on the term 'of considerable value'.[131]

On the law of pension funds the general part of the federal social security law is in general not applicable. Furthermore, pension funds have no right to take administrative acts; they act as normal private persons. Therefore the auto-regulations of the pension funds are applied instead of the mentioned principles from administrative law when errors become noticeable. As a general rule, later alteration of incorrectly calculated prestations is subsequently possible.

3.4 Unduly paid benefits

Unlawfully drawn benefits have to be refunded. For most branches of social insurance, this principle can be deduced from Art. 25 ATSG. For pension funds the relevant clause can be found in Art. 35a BVG. Both, cash benefits and benefits in kind have to be refunded up to the full amount of paid or compensated benefits.

However, if hardship is present and benefits have been received in good faith, a refund is not needed (Art. 25 al. 1 ATSG, Art. 35a Abs. 1 BVG). To derive from good faith is when awareness of an illegal drawing of benefits is missing and justifiable under the given circumstances. Concretion to the term of 'significant hardship' can be found in Art. 5 ATSV.[132] This regulation has been formed in a way that the financial situation of a person having to refund benefits has to be considerably good in order to deny the existence of a significant hardship.

As far as no specific regulations exist in cantonal social assistance laws, general rules for revocation of administrative acts can be applied. However, in social assistance the question if or under which circumstances, prestations are to be paid back in the case of subsequent proof of unfulfilled qualifications is usually in the foreground. Cantons have different regulations on this issue. Some cantons have special regulations for the case of drawn benefits in good faith with an existence of a significant hardship for the relevant person, but almost all cantons perceive illegally granted benefits as refundable.[133]

3.5 'Rulings' in social security

As described in the beginning, the principle of legality is relevant in most parts of social security law. Almost every kind of ruling creates a constellation of tension regarding this principle. Therefore communication on certain points between insured persons and institutions is limited to narrow scope.[134] Three examples for this narrow scope of application for rulings are:

[131] Locher (N 90), p. 468 et seq.

[132] Verordnung über den Allgemeinen Teil des Sozialversicherungsrechts (SR 830.11).

[133] Wolffers, (N 93), p. 181.

[134] C.f. Ueli Kieser, Allgemeiner Teil, in: Ulrich Meyer (ed.), Soziale Sicherheit, 2nd ed., Basel/Geneva/Munich 2007, N. 63 et seq.

- Since 2003 the Federal Law on the general part of social insurance contains an explicit regulation for comparison (Art. 50 ATSG), valid for branches of social insurances being subordinated to this law. This provision allows insurers and authorities to reach a settlement with an insured person when disputes concerning benefits arise (Art. 50 al. 1 ATSG). Hence, the comparison has to be confirmed in the form of an administrative act by the authority concerned (Art. 50 al. 2 ATSG). Normally it can be appealed against this confirmation. Moreover, it follows from the history of this provision that settlements should only be possible for benefits from insurances and not for contributions to them. The explicit reason for this regulation has its origin in the consideration of protecting social insurance authorities from to much pressure coming from important employers. The possibility for settlement in a trial before a tribunal although has been extended through practice to disputes concerning benefits and contributions at the same time[135]. However, settlements concerning contributions alone are – also in court – still not allowed.
- For some employers the formal correct accounting with the authorities of social insurance is not proportional to the contributions which have to be paid. Therefore administrative easement is implemented in several laws for cases in which only small incomes are insured or salaries are paid only irregularly. The aim herewith is to simplify accounting for employers with insurances by decreasing the requirements of the law. Employers normally have to apply for these easements with the authorities; this can be understood as a small field in which a kind of administrative ruling is possible.
- Communication with the institutions of the old-age insurance concerning the question of how certain occupations are to be classified (meaning which regulations are to be applied, the ones for self-employed or for employed occupations) is still not possible, although strongly requested by practice. Until a significant change of practice coming from the Federal Court in 2006, the responsible institutions even refused to take an administrative act in advance, before somebody took up his occupation.[136] For this person it remained unclear how the occupation would be classified until the authorities qualified it. Since the change of practice at least future self-employed persons have the right to receive a binding administrative act concerning the question whether they will be classified as employed or as self-employed persons. However, neither margin for negotiation exists here: decisions are made by the institutions in charge of the old-age insurance.

[135] BGE 131 V 417.

[136] BGE 132 V 257.

4 Consequences of non-information or incorrect information

4.1 Consequences of incorrect information

The Swiss system of social security is – as with most social security systems – complex in structure and difficult to understand for the insured persons. However, benefits coming from social insurances and social assistance are in most cases of exceptional value for them. Therefore information provided by the administration is of major importance to the insured persons.

Insured persons getting incorrect information are protected by the principle of protection of confidence (Art. 9 Constitution). The principle of protection of confidence has through a long-standing legal practice been approved by the Federal Court in administrative law as well as in social security law.[137]

The following qualifications have to be fulfilled for a successful appeal to protection of confidence:

- The administration must have acted in a specific situation with regard to a specific person.
- The administration had to be either in charge of giving the information or it should have seemed, for good reasons to the concerned person, as the responsible one for providing them.
- The incorrectness of the information could not have been detected by the concerned person without further difficulties.
- Relying upon the provided information, arrangements must have been made which cannot be cancelled harmlessly.
- Legal order has not changed since the providing of the information.

If someone has trusted in information provided by the responsible authority and this information subsequently turns out to be wrong, appeal on protection of confidence is allowed. In these cases insured persons will be looked at as if the relevant wrong information was correct.[138]

4.2 The duty to inform in Swiss social security law

For all branches subordinated to the Federal Law on the general part of social insurance law a provision concerning the duty to clarify and advise has been created. This provision reaches beyond the mentioned practice regarding the protection of confidence.[139]

[137] Locher (N 90), p. 88 et seq.; Maurer (N 91), p. 160 et seq.

[138] Locher (N 90), p. 89 et seq.

[139] Raymond Spira, Du droit d'être renseigné et conseillé par les assureurs et les organes d'exécution des assurances sociales (Art. 27 LPGA), SZS 2001, p. 524 et seq.; Ulrich Meyer, Grundlagen, Begriff und

A duty of persons in charge of social insurance is to provide adequate general information to persons interested in their rights and duties (Art. 27 al. 1 ATSG). Beyond that every person has the right to specific information concerning his specific case (Art. 27 al. 2 ATSG). Normally no fee is charged for this information. If institutions find out about the insured's right (or the right of his relatives) to benefits from other institutions, the person concerned must be informed immediately (Art. 27 al. 3 ATSG).[140] The main aim of this regulation is to improve accessibility to the system of social security by creating an obligation of advice for institutions and persons in charge of the administration of social insurance.

The meaning of this provision has already had to be examined several times by the Federal Court. In 2005 an important judgment was made defining the obligation to advise every single person on their personal rights and duties in a very broad way (BGE 131 V 472). Referring to this legal practice, insured persons have a right to specific information regarding their personal situation in order to assert their rights. The omission to provide the insured persons with the information has – following the practice of the federal court – the same consequences as wrong information. Therewith the obligation on information according to Art. 27 al. 2 ATSG has clearly been linked to the already described protection of confidence in terms of Art. 9 Constitution. For administrations this new practice is felt as a noticeable extra burden due to the additional information which has to be provided in any case. For the insured persons being overstrained by the system of social security though, it is a clear change for the better.

However, the institution's obligation of advice is limited to its own branch of insurance. Instruction is essential though when the institution detects the insured's right to benefits from other institutions. Nevertheless institutions are not obligated to search specifically for such further benefits.[141]

Apart from the 'right to advice' dealt with in Art. 27 al. 2 ATSG there are other regulations stating specific obligations of advice. According to Art. 23 al. 3 ATSG, institutions have to warn insured persons of possible consequences resulting from a denial of benefits. Moreover an explanation of consequences is necessary for the case of an insured person refusing to cooperate regarding the searching of the real facts (Art. 43 al. 3 ATSG). In addition, specific regulations exist including an even more detailed obligation for providing information on the side of the insured person in order to protect them from a loss of their rights.[142]

Grenzen der Beratungspflicht nach Art. 27 Abs. 2 ATSG, in: René Schaffhauser/Franz Schlauri (Ed.), Sozialversicherungsrechtstagung 2006, St. Gallen 2006, p. 9 et seq.

[140] Jacques-André Schneider, Informations et conseils à l'assurance dans les assurances sociales: le tournant de la LPGA, in Bettina Kahil-Wolff (Ed.), La partie générale du droit des assurances sociales, Lausanne 2003, p. 37 et seq, 85.

[141] Locher (N 90), p. 431.

[142] Kieser (N 130), N. 23 et seq.

The rights to information described above have to be understood in conjunction with another principle of Swiss social insurance law: For someone wanting to get prestations from social insurance it is necesary to apply for it himself and to pay attention to the correct and relevant form of the application (Art. 29 ATSG). The right to individual information can only come into force when the process has been started by an appropriate application.[143] Once the proceeding has started though, the said rights to information become effective.

Some obligations on information for insured persons exist as well in pension fund regulations. Information requirements have broadly been regulated since 2005 in Art. 86b BVG. This norm names the issues in which pension funds are obliged to provide regular information. However no general obligation to provide advice like the one deduced from Art. 27 al. 2 ATSG is implemented in this field. At least a similar duty of the pension funds could be deduced from the contract between the employer and the pension fund, the additional contract between the employee and the pension fund or the autonomous regulation of the pension fund.

Furthermore these obligations are not directly applicable on the sector of social assistance. Usually the cantons do not stipulate obligations to provide advice in their social assistance laws. Nevertheless an obligation on information can – from case to case – be derived from cantonal process law. Moreover, certain social administration obligations on information towards persons in need can be deduced from the principles of equity and good faith.

5 Concluding remarks

In the practice of social security law many principles of the administrative law are applied. The fact that several benefits from social security are of existential value to insured persons and persons in need is evidenced by various particularities. Compared to other areas of law, the shift of emphasis is mainly shown in the comprehension of the principle of legality, the particularities in practicing the principle of proportionality and in the growing importance of protection of confidence.

- When defining the principle of legality there is reference to the uncontested thesis which says that the principle is true for benefits of existential value like in interference into one's rights. A high degree of legal certainty is demanded for regulations of prestations in social security law.
- The principle of proportionality shows results on different levels: Qualifications for revocation of an administrative act in social security law are harder to fulfil than in other areas of administrative law. Furthermore there is a strong privilege for the legal situation of persons having drawn benefits unlawfully but in good faith. A refund is only necessary when no hardship results from it. This is true for the sector of social security as well as for the area of social assistance. Moreover, concrete protection of such a beneficiary could be supported additionally by the protection of confidence.
- In social security law, the principle of protection of confidence is of major importance. Information and advice provided by the relevant administration can form possible grounds for confidence. Furthermore, application of the obligation on information has been broadened to a duty to inform for administrations by the recent legal practice. Even omitted information can form grounds for confidence. Furthermore, lack of information can result in a situation where the insured person is put in a situation as if the information had been provided correctly. It can also be understood as an expression of the principle of confidence that long-term prestations normally don't have to be adapted in case of a legal change; except where a change is explicitly intended.

In conclusion it can be said that for the application of social security law there is no principle of security as such. Nevertheless many other principles affirm that one's possible existential needs of security are covered. Compared to other areas of law, it is rather a shift of emphasis than a fundamental difference in access to the issue.

[143] Locher (N 90), p. 430.